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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 BRADLEY VAN PATTEN, an individual,
12 on behalf of himself and all others
13 similarly situated,
14
15 vs. Plaintiff,
16
17 VERTICAL FITNESS GROUP, LLC, etc.,
18 Defendant.
19

CASE NO. 12cv1614-LAB (MDD)
**ORDER ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT**

20 Van Patten accuses Vertical Fitness and Advecor of sending two unsolicited text
21 messages to his cell phone in violation of the federal Telephone Consumer Protection Act
22 and California's Unfair Competition Law. The Court previously certified a class for the TCPA
23 claim. Now pending are cross-motions for summary judgment.

24 **I. Factual Allegations**

25 Van Patten entered a Gold's Gym in Green Bay, Wisconsin on or around March 21,
26 2009, interested in joining. He filled out an application card, also called a "pre-qualification"
27 or "desk courtesy" card, in which he provided his address and phone number and indicated
28 his reasons for being interested in the gym. This application card was a prelude to a tour

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1 of the gym and a sit-down with a gym manager, who would then learn more about
2 Van Patten's interest in the gym and explain the various membership options to him.
3 (Van Patten Dep. at 124:11–125:18; Berggren Dep at 47: 21–51:15.) Van Patten decided
4 to join.

5 Aime Berggren was the gym manager who met Van Patten. She filled out a
6 membership agreement for him to sign, which he did. (Van Patten Dep. at 125:13–126:19;
7 Berggren Dep. at 54:4–18; 61:6–7.) That agreement contained his phone number.
8 Berggren didn't ask Van Patten for his phone number at that time, though; she simply copied
9 it from the application card he had previously filled out. (Berggren Dep. at 86:11–23.)

10 Berggren didn't ask Van Patten if he had any reservations about being contacted at
11 the telephone number. (Berggren Dep. at 95:5–8.) It wasn't her practice or the gym's to ask
12 that question, or to offer a new member the option of not being contacted. (Berggren Dep.
13 at 95:9–19; 95:25–96:7.) Nor did she explain that the number might be used for marketing
14 purposes. (Berggren Dep. at 69:16–20.) It was her practice to let the member ask not to
15 be contacted, or to place limitations on the use of his phone number, in which case his
16 preference would be noted on the membership agreement. (Berggren Dep. at 95:23–24;
17 85:14–86:4; 96:14–20; Barton Dep. at 177:3–9.)

18 It's absolutely clear that Van Patten's phone number appears on the membership
19 agreement without any restrictions. It's also clear enough that just as Berggren didn't ask
20 Van Patten about the use of his phone number, he didn't raise the issue either. (Van Patten
21 Dep. at 107:23–108:10.) It simply never came up, in particular with respect to marketing text
22 messages. (Berggren Dep. at 69:12–15; 70:7–9.)

23 All of this should be familiar to anyone who has every joined a gym. The potential
24 member walks in, the gym gets some basic information from him, and following a sales pitch
25 he either chooses to join or doesn't. Whether the gym will use the information he provides
26 is not much on his mind. Indeed, by their own admission neither Van Patten nor Berggren
27 have a great memory of the day he joined Gold's. Van Patten remembers "speaking with
28 some representative" and "getting a tour," but he doesn't remember what was said to him

1 or what he said. (Van Patten Dep. at 104:1–105:11; 107:10–14.) Berggren, for her part,
2 doesn't even remember Van Patten personally and doesn't remember her discussions with
3 him. (Berggren Dep. at 42:16–44:23.)

4 Van Patten wasn't a member of Gold's for very long. He cancelled his membership
5 within a three-day no-cost cancellation window. (Barton Dep. at 129:9–12.) Now, fast
6 forward several years.

7 The Gold's Gym that Van Patten had joined in Green Bay was a franchise, owned by
8 an LLC. (Barton Dep. at 225:21–226:1; 36:10–37:18.) It is still owned by that LLC today,
9 although in May 2012 the LLC severed the gym's affiliation with Gold's and re-branded it
10 Xperience Fitness. (Barton Dep. at 46:2–13; 48:5–15; 226:6–11; 225:7–11.) Xperience
11 Fitness is a brand owned by the Defendant in this case, Vertical Fitness. Vertical Fitness,
12 to be clear, doesn't have an ownership stake itself in the Green Bay gym; it is just the owner
13 of the brand. (Barton Dep. at 37:13–21.) All that matters here is that the gym Van Patten
14 joined is still in business and still owned by the same people; it just has a different brand
15 affiliation. (Barton Dep. at 46:7–13.) Van Patten says this happened "4 years and 6 months
16 . . . since Mr. Van Patten canceled his Gold's Gym contract," but as the Court does the math
17 the time lapse was approximately 3 years and 1 month (March 21, 2009 to May 2012).

18 Vertical Fitness engaged Defendant Advecor, a marketing company, to develop a
19 campaign to announce that the gym—as well as other area Gold's Gyms—was becoming
20 an Xperience Fitness gym. (Barton Dep. at 8:7–11.) The goal was mainly to get former
21 members to come back. (Barton Dep. at 17:16–18:6; Advecor Dep. at 25:12–26:16.) The
22 text messages at issue in this case were part of that campaign. (Barton Dep. at 6:16–7:19;
23 8:13–23; 40:18–21; Advecor Dep. at 31:7–18; 82:9–12.) Now that it's under fire, Vertical
24 Fitness tries to downplay its responsibility for the texts: (1) they were "[o]ne small part of the
25 campaign"; (2) Advecor, not Vertical Fitness, conceived, developed and sent them; and (3)
26 Vertical Fitness didn't even know how many texts were sent. (Doc. No. 43 at 5–6.) Be that
27 as it may, there is no denying that Vertical Fitness authorized and paid for the texts. (Barton
28 Dep. at 8:16–23.)

1 Van Patten received two text messages sent to former members of the gym. There's
2 no dispute about that. One was sent on May 14, 2012, and another on June 25, 2012.
3 (Van Patten Dep. at 94:16–19; Advecor Dep. at 31:16–34:2;) (A third text was sent to
4 *current* members, also on June 25.) The texts said essentially the same thing: “Gold’s Gym
5 is now Xperience Fitness. Come back today for \$9.99/month, no commitment. Enter for a
6 chance to win a Nissan Xterra.” (Ellis Decl., Ex. 7.) It went to approximately 30,000 former
7 members. (Doc. No. 47-1 at 5.)

8 **II. Legal Standard**

9 Summary judgment is appropriate where “there is no genuine issue as to any material
10 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). It is
11 the burden of the movant—every party in this case, considering there are cross-motions—to
12 show there isn’t a genuine issue as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S.
13 317, 323 (1986).

14 The Court considers the record as a whole and draws all reasonable inferences in the
15 light most favorable to the non-moving party. *Fairbank v. Wunderman Cato Johnson*, 212
16 F.3d 528, 531 (9th Cir. 2000). It may not make credibility determinations or weigh conflicting
17 evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Rather, the Court
18 determines whether the record “presents a sufficient disagreement to require submission to
19 a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at
20 251–52. Not all alleged factual disputes will serve to forestall summary judgment; they must
21 be both material and genuine. *Id.* at 247–49. “If conflicting inference may be drawn from
22 the facts, the case must go to the jury.” *LaLonde v. County of Riverside*, 204 F.3d 947, 959
23 (9th Cir. 2000) (citations omitted).

24 **III. Discussion**

25 The front-and-center question in this case is whether Van Patten consented to
26 receiving the texts at issue. Consent is the first issue raised by Vertical Fitness and Advecor
27 in their respective motions for summary judgment, and it is the *only* issue raised in
28 Van Patten’s motion for partial summary judgment—an attempt on his part to deprive the

1 defendants of an affirmative defense going into trial. If Van Patten did consent to receiving
2 the texts, this case is essentially over for him and the Court needn't even reach the other
3 issues raised by Vertical Fitness and Advecor. The Court will start with that issue.

4 **A. Consent**

5 There are three elements to a TCPA claim: "the defendant called a cellular telephone
6 number; (2) using an automatic telephone dialing system; (3) without the recipient's prior
7 express consent." *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir.
8 2012). The focus here is obviously on the third element, and at least two courts in this
9 District have recognized that whether a TCPA plaintiff actually gave express prior consent
10 is an affirmative defense to be raised and proven by a defendant. See *Robbins v. Coca-*
11 *Cola Co.*, 2013 WL 2252646 at *2 (S.D. Cal. May 22, 2013); *Connelly v. Hilton Grand*
12 *Vacations Co., LLC*, 2012 WL 2129364 at *3 (S.D. Cal. June 11, 2012). See also *Grant v.*
13 *Capital Mgmt. Servs., L.P.*, 449 Fed.Appx. 598, 600 n.1 (9th Cir. 2011).

14 There is no dispute here that Van Patten never actually said to Vertical Fitness, "Yes,
15 you may text me at the number I have given you," or anything like that. He never signed his
16 name or initialed next to a disclaimer that by providing his phone number to Vertical Fitness
17 he was welcoming text messages. As the Court said above, when Van Patten joined the
18 Gold's Gym, the subject of text messages never came up. (Berggren Dep. at 69:12–15;
19 70:7–9.) Van Patten simply provided his phone number on an application card with no
20 discussion of why Gold's Gym needed it or what they would do with it. (Van Patten Dep. at
21 124:13–22.) But according to Vertical Fitness, no discussion was required. The mere act
22 of Van Patten writing down his phone number on an application card was all the consent it
23 needed.

24 Vertical Fitness relies, first, on various FCC interpretations of the TCPA, beginning
25 with one in 1992 that said "persons who knowingly release their phone numbers have in
26 effect given their invitation or permission to be called at the number which they have given,
27 absent instructions to the contrary." *In re Rules & Reg's Implementing the Tel. Consumer*
28 *Prot. Act of 1991*, 7 F.C.C.R. 8752, 8769 (Oct. 16, 1992). Subsequently in 2008, in the

1 context of debt collection calls, the FCC concluded that “the provision of a cell phone number
2 to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent
3 by the cell phone subscriber to be contacted at that number regarding the debt.” *In re Rules*
4 *& Reg’s Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C.R. 559, 564 (Jan. 4,
5 2008). The FCC did change course in 2012, concluding that “requiring prior express written
6 consent for telemarketing calls utilizing autodialed or prerecorded technologies will further
7 reduce the opportunities for telemarketers to place unwanted or unexpected calls to
8 consumers,” but this interpretation of the TCPA was prospective, commencing twelve
9 months after “publication of OMB approval of our written consent rules in the Federal
10 Register.” *In re Rules & Reg’s Implementing the Tel. Consumer Prot. Act of 1991*, 27
11 F.C.C.R. 1830, 1839, 1856–67 (Feb. 15 2012). It took effect on October 16, 2013, well after
12 the texts at issue in this case were second. (Ellis Decl., Ex. 13.) These FCC Orders clearly
13 cut against Van Patten.

14 Vertical Fitness relies, second, on various cases that cite these FCC interpretations
15 in dismissing claims brought under the TCPA. And there are a lot of those cases, some
16 even decided while the motions for summary judgment have been under submission. The
17 Court will discuss them individually.

18 In *Pinkard v. Wal-Mart*, the first case, the plaintiff alleged a TCPA violation when she
19 filled a prescription at Wal-Mart’s pharmacy, provided her phone number, and subsequently
20 received texts from the store. 2012 WL 5511039 at *2 (N.D. Ala. Nov. 9, 2012). As in this
21 case, the store didn’t get the plaintiff’s explicit permission to send her text messages (and
22 their substance may have not even been related to her prescription); she was simply
23 automatically enrolled into a texting program in virtue of providing her phone number at the
24 point of sale. Nonetheless, relying on the 1992 FCC Order, the court held that the plaintiff
25 consented to receiving the texts and had no claim under the TCPA: “‘Prior express consent’
26 to receive a call is given when the ‘called party’ voluntarily proffers her telephone number to
27 the calling party. By her complaint’s own admission, plaintiff provided her telephone number
28 to defendant at defendant’s request.” *Id.* at *6.

1 *Emanuel v. Los Angeles Lakers, Inc.* also cuts against Van Patten. 2013 WL
2 1719035 (C.D. Cal. Apr. 18, 2013). The plaintiff in *Emanuel* had attended a Lakers game
3 and, at the invitation of the team displayed on the large monitor in the arena, texted a
4 message that he hoped would be displayed on that monitor. He immediately received a
5 confirmation text saying, among other things, “Thnx! Txt as many times as u like. Not all
6 msgs go on screen.” *Id.* at *1. He later sued, claiming that the confirmation text violated the
7 TCPA. The court disagreed, again relying in part on the 1992 FCC Order, along with the
8 context of the plaintiff’s text and the response text. It noted that “many federal courts have
9 concluded that when a customer provides a company his or her phone number in connection
10 with a transaction, he or she consents to receiving calls about that transaction,” setting up
11 the conclusion that “because Plaintiff voluntarily provided his number to the Lakers in
12 requesting that his personal message appear on the Staples Center jumbotron . . . he
13 consented to receiving a confirmatory text from the Lakers.” *Id.* at 3–4.

14 The same reasoning appears in *Roberts v. PayPal, Inc.*, in which a plaintiff added his
15 phone number to his PayPal account, immediately received a confirmation text, and then
16 filed a TCPA action. 2013 WL 2384242 (N.D. Cal. May 30, 2013). The court followed
17 *Pinkard*, holding that by merely providing his number to PayPal the plaintiff consented to
18 received the text at issue. *Id.* at 4–5. *Pinkard*, *Emanuel*, and *Roberts* are the cases Vertical
19 Fitness relies upon in its own summary judgment brief. Subsequent cases were decided in
20 a way that’s also favorable to Vertical Fitness after the Court took the summary judgment
21 motions under submission.

22 The first of those cases, *Murphy v. DCI Biologicals Orlando, LLC*, is right on point
23 here. 2013 WL 6865772 (M.D. Fla. Dec. 31, 2013). The plaintiff in *Murphy* was a former
24 blood donor. He had been paid to give blood at a plasma collection center, and he had
25 willingly provided his phone number as part of his medical and biographical background. *Id.*
26 at *1. This was in March through June of 2010. *Id.* at *2. Over two years later, in August
27 of 2012, the plasma collection center sent him texts asking him to return, and offering him
28 a financial bonus for doing so. Considering itself bound by the 1992 FCC Order, the court

1 found that “Murray’s provision to the Defendants of his cellular phone number constituted
2 his express consent to the Defendants to call him at that number.” *Id.* at *5. In fact, the
3 plaintiff provided his phone number on a “New Donor Information Sheet” that was likely quite
4 similar to the application card on which Van Patten provided his phone number when he
5 joined Gold’s Gym.

6 Another court considered itself bound by the 1992 FCC Order in *Baird v. Sabre Inc.*,
7 a case involving a plaintiff who booked a flight on the Hawaiian Airlines website, provided
8 her phone number, and then received a text from a contractor company asking if she wished
9 to receive flight notifications by text. 2014 WL 320205 (C.D. Cal. Jan. 28, 2014). Finding
10 for the defendant, the court said that “[u]nder the FCC’s definition, it is undisputed that Baird
11 ‘knowingly release[d]’ her cellphone number to Hawaiian airlines when she booked her
12 tickets, and by doing so gave permission to be called at that number by an automated dialing
13 machine.” *Id.* at *6.

14 The next case, *Kolinek v. Walgreen Co.*, involved a time lapse between the provision
15 of a phone number and the allegedly infringing texts that was almost a decade—longer than
16 the lapse in *Murphy* and the lapse in this case. 2014 WL 518174 (N.D. Ill. Feb. 10, 2014).
17 The plaintiff filled a prescription at Walgreen’s, provided his cell phone number for identity
18 verification purposes, and over ten years later he began receiving “robocalls” reminding him
19 to refill his prescription. *Id.* at *1. Once again, the court found that the 1992 FCC Order
20 governed and that the plaintiff’s admission that he gave Walgreen’s his phone number was
21 fatal to his TCPA claim. *Id.* at *2.

22 In *Steinhoff v. Star Media Co., LLC*, the court applied the 1992 FCC Order and the
23 2008 FCC Order to conclude that a plaintiff who provided her phone number when she
24 signed up for a one-year newspaper subscription had no TCPA claim arising out of attempts
25 the newspaper made about a past-due balance and renewal when the subscription ended.
26 2014 WL 1207804 (D. Minn. Mar. 24, 2014). *Id.* at *2–3. It also reasoned that the mere end
27 of the subscription didn’t terminate the consent that came with providing the phone number
28 in the beginning, especially absent any affirmative act to revoke the consent. *Id.* at *4.

1 The last case the Court will mention—though far from the last case available—is
2 *Andersen v. Harris & Harris*. 2014 WL 1600575 (E.D. Wisc. Apr. 21, 2014). The plaintiff in
3 this case provided his phone number to a utility company in order to open an account and
4 receive power at various meters. This was in December 2003. *Id.* at *3. Years later, after
5 he stopped paying his account, the utility company hired a collection agency, and the agency
6 placed numerous calls to the number that were only met with a voicemail message warning
7 of a potential TCPA violation. *Id.* at *3. Relying on the 1992 and 2008 FCC Orders, the
8 Court had no doubt that “under the FCC guidance and myriad cases . . . Mr. Anderson
9 consented to be called on his cell phone number” *Id.* at *9.

10 Collectively, all of these cases amount to a flurry of punches that has Van Patten on
11 the ropes, and his attempt to right himself is unpersuasive. In no particular order, Van
12 Patten counters: they aren’t binding precedent if they’re not from within the Ninth Circuit;
13 they’re factually distinguishable; the Court needn’t defer to the FCC, which is wrong anyway;
14 the only true “prior express consent” is consent that is affirmatively stated and recorded, as
15 opposed to passively providing a phone number; other cases are on its side; and even if
16 Van Patten did give consent, he gave it to Gold’s not to Vertical Fitness and he withdrew it
17 when he cancelled his membership.

18 First, with respect to the force of the FCC Orders, Vertical Fitness has identified, by
19 the Court’s count, at least seven cases that examine and follow them—some from within the
20 Ninth Circuit and some from outside of it. Van Patten has identified just one case that goes
21 the other way, *Luskin v. Seminole Comedy, Inc.*, 2013 WL 3147339 (S.D. Fla. June 19,
22 2013). In *Luskin*, the Court referred to the dictionary and common usage definitions of
23 “prior express consent” over the 1992 FCC Order, finding that “[s]ince Seminole Comedy’s
24 prior-express-consent argument is predicated solely on the 1992 FCC Order, the argument
25 necessarily fails because the 1992 FCC Order deviates from the plain language of the
26 statute on the express-consent issue.” *Id.* at *3. With all due respect to the *Luskin* court,
27 this Court is inclined to follow the many other cases that treat the FCC Orders as binding.
28 Indeed, one Judge in the Northern District of California who initially questioned the validity

1 of the FCC's Orders subsequently vacated her opinion to acknowledge that she lacked the
2 authority to do so. See *Leckler v. Cashcall, Inc.*, 2008 WL 5000528 at *3 (N.D. Cal. Nov. 21,
3 2008) ("The federal courts of appeals had exclusive jurisdiction over plaintiffs' challenge to
4 the FCC's declaratory ruling.") (vacating *Leckler v. Cashcall*, 554 F.Supp.2d 1025 (N.D. Cal.
5 2008)). Under the Administrative Orders Review Act, 28 U.S.C. § 2342(1), only the Courts
6 of Appeals have the authority to invalidate them. *Murphy*, 2013 WL 6865772 at *5–8.

7 Second, two cases from within this district that Van Patten cites, *In re Jiffy Lube Int'l,*
8 *Inc. Text Spam Litig.* and *Connelly v. Hilton*, aren't as helpful as he needs them to be.
9 *Connelly*, which predates all of the cases discussed above, ruled on a motion to dismiss with
10 little evidentiary record. 2012 WL 2129364 at *4. It even passed on the question whether
11 providing a phone number on a Hilton Honors application sufficed as "prior express consent"
12 to be called because there was no evidence that the plaintiffs had actually submitted such
13 an application. *Id.* It did refuse to conclude that "one who provides a contact telephone
14 number in booking a hotel reservation is 'clearly and unmistakably' consenting to receive
15 promotional calls," but the factual record of the case hadn't been developed and the FCC's
16 Orders received no mention. *Id.* Likewise, *Jiffy Lube*, which also predates all of the above
17 cases, was a ruling on a motion to dismiss that didn't even consider the evidentiary basis of
18 the alleged consent; it made the mere passing remark that "even if [the Court] were to take
19 judicial notice of the invoices, it is not persuaded that a customer's provision of a telephone
20 number on the invoice would constitute prior express consent." 847 F.Supp.2d 1253, 1259
21 n.7. With all due respect, the *Jiffy Lube* and *Connelly* decisions can't stand up to the far
22 more robust analyses in the cases that followed and that the Court has discussed above.

23 Third, Van Patten relies too heavily on *Satterfield v. Simon & Schuster*. It's true that
24 the Ninth Circuit held in *Satterfield* that express consent is "consent that is clearly and
25 unmistakably stated." 569 F.3d 946, 955 (9th Cir. 2009). But the context of the consent
26 discussion in that case was whether consent to be contacted by one company's "affiliates
27 and brands" constituted consent to be contacted by a totally unrelated company. The
28 plaintiff signed up for promotions from a ringtone company, Nextones.com, and then

1 received a text from a publishing company promoting Stephen King’s latest book. *Id.* at 949.
2 The Ninth Circuit didn’t cite the 1992 FCC Order’s interpretation of “express consent,” even
3 though it did defer to the Order’s interpretation of a “call” under the TCPA, and it held that
4 “Satterfield’s consent to receive promotional material by Nextones and its affiliates and
5 brands cannot be read as consenting to the receipt of Simon & Schuster’s promotional
6 material.” *Id.* at 955.

7 But *Satterfield* has less traction where, as in this case, the party being sued is
8 essentially the very party to whom the phone number was given—Van Patten’s argument
9 that Vertical Fitness and Gold’s Gym are separate companies notwithstanding. *See Pinkard*,
10 2012 WL 5511039 at *5; *Roberts*, 2013 WL 2384242 at *4 (“The *Satterfield* plaintiff provided
11 her cell phone number to Nextones in order to receive a free ringtone, and then received a
12 text message from a completely different company (Simon & Schuster) regarding a
13 completely different subject (a Stephen King novel).”); *Baird*, 2014 WL 320205 at *3 (“While
14 the court mentioned the dictionary definition of ‘express consent’ in support of the conclusion
15 that a person’s consent to receive calls from one business does not constitute consent to
16 receive calls from a different business, the issue of whether the mere act of providing a
17 cellphone number constitutes ‘express consent’ did not arise in *Satterfield*.”). Even if the
18 Court made much of the fact in *Satterfield* that the plaintiff didn’t just provide her number,
19 but actually checked “Yes!” next to a box offering promotional messages, this still wouldn’t
20 get Van Patten around the 1992 FCC Order, which “the Ninth Circuit had no power to reject
21 . . . in the course of an appeal from a judgment denying a TCPA claim.” *Baird*, 2014 WL
22 320205 at *4.

23 Fourth, Van Patten exaggerates the significance of the factual details of this case that
24 he believes distinguish it from the above cases and cut in his favor. The argument that any
25 consent given to Gold’s Gym didn’t transfer to Vertical Fitness is a non-starter. The very
26 deposition testimony Van Patten cites confirms that Vertical Fitness is simply a different
27 brand name on the very same gym with the very same ownership. (Barton Dep. at 46:7–13.)
28 There is no evidence to support Van Patten’s characterization of it as a “third-party

1 promoter.” (Doc. No. 47-1 at 14.) The time lapse of four years is also insignificant because
2 “consent under the TCPA does not expire on its own; it must be revoked.” *Kolinek*, 2014 WL
3 518174 at *3. Finally, the Court doesn’t agree that mere membership cancellation is
4 tantamount to the revocation of consent, as Van Patten argues. The Third Circuit did hold
5 that the TCPA allows consumers to revoke their prior express consent, and without any
6 temporal limitation, but the plaintiff in the case had actually written to the defendant listing
7 her phone number and asking the defendant to stop calling it. *Gager v. Dell Fin. Servs.,*
8 *LLC*, 727 F.3d 265, 267, 271 (3d Cir. 2013). This allowed for the application of the torts
9 principle, which Van Patten cites, that “consent is terminated when the actor knows or has
10 reason to know that the other is no longer willing for him to continue the particular conduct.”
11 *Id.* at 271 (quoting Restatement (Second) of Torts § 892A, cmt. I (1979)). *See also Osorno*
12 *v. State Farm Bank, F.S.B.*, 2014 WL 1258023 at *10–11 (11th Cir. 2014); *Beal v. Wyndham*
13 *Vacation Resorts, Inc.*, 956 F.Supp.2d 962, 977 (W.D. Wis. June 20, 2013) (“This
14 unwillingness may be manifested to the actor by any words or conduct inconsistent with
15 continued consent”) (quoting Restatement (Second) of Torts § 892A, cmt. I (1979)).

16 Here, however, it doesn’t follow from Van Patten’s mere cancellation of his gym
17 membership that he no longer wished to be contacted by the gym, or that Vertical Fitness
18 should have understood this. The court in *Steinhoff* found that the expiration of a newspaper
19 subscription didn’t constitute an “affirmative act of revocation,” 2014 WL 1207804 at *4, and
20 in *Anderson* the plaintiff’s voice recording asserting his rights under the TCPA was held to
21 not give the defendant proper notice of a revocation. 2014 WL 1600575 at *10. Against the
22 backdrop of these cases, the Court is not persuaded that by merely cancelling his
23 membership, Van Patten revoked his prior express consent to be contacted.

24 Fifth, the text Vertical Fitness sent related to the original reason Van Patten provided
25 his number: gym membership. And it is this very characteristic of a text that insulates it from
26 a claim under the TCPA. As the court put it in *Emanuel*, “the fact that the confirmatory text
27 included information relevant to Plaintiff’s request demonstrates—in part—why the message
28 challenged here is not the kind of intrusive, nuisance telemarketing call that Congress sought

1 to prohibit in enacting the TCPA.” 2013 WL 1719035 at *3 (internal quotations and citation
2 omitted). *See also Roberts*, 2013 WL 2384242 at *4 (dismissing TCPA claim where “the
3 content of the complained-about text message is closely related to the circumstances under
4 which plaintiff provided his cell phone number”).

5 For all of the above reasons, the Court finds that summary judgment is appropriate
6 for Vertical Fitness on its affirmative defense that Van Patten consented to receiving the
7 texts at issue when he provided his phone number upon joining the gym. The Court is
8 bound by the 1992 FCC Order interpreting “prior express consent,” and the caselaw from this
9 and other districts is unquestionably on the side of Vertical Fitness. *See, e.g., Murphy*, 2013
10 WL 6865772 at *6–8. Defendants’ motion for summary judgment on the TCPA claim is
11 therefore **GRANTED**.

12 **B. State Claims**

13 In addition to a TCPA claim, Van Patten asserts a claim under California’s equivalent,
14 Cal. Bus. and Prof. Code § 17538.41. He also asserts a claim under § 17200 of the
15 Business and Professions Code.

16 When the Court certified the class in this case, it noted that a TCPA claim differs
17 subtly from a § 17538.41 claim, at least as far as their respective statutes read, and that
18 Van Patten’s complaint isn’t sensitive to their differences. (Doc. No. 54 at 4.) In asserting
19 his § 17538.41 claim, for example, he calls the texts “unsolicited” and made “without prior
20 consent,” characterizations that really only implicate the TCPA. (FAC ¶ 45.) Under
21 § 17538.41 there is no “prior express consent” requirement, only an exception to liability if
22 a company gives consumers an option to not receive the texts. The Court even declined to
23 certify a sub-class of California residents for this reason, among others. It said, “Frankly,
24 and with all due respect to Van Patten, the Court believes the California claims were thrown
25 into the complaint and first amended complaint as filler, and if Van Patten isn’t going to
26 pursue and take them seriously, neither is the Court.” (Doc. NO. 54 at 7.) *Still*, the Court
27 finds the California claims to be under-developed and under-argued, but they remain on the
28 table (for Van Patten only) and the Court must address them.

1 Section 17538.41 applies only to entities conducting business in California. Vertical
2 Fitness argues that it doesn't conduct business in California, and that's that. It doesn't even
3 rely on the exceptions to § 17538.41 that the Court addressed in its class certification order,
4 for example the exception that arises when the consumer is given an option not to receive
5 text messages. It simply argues, "Here, there are absolutely no facts that show Vertical
6 Fitness conducts any business, intentionally or otherwise, in California. Rather, the
7 undisputed facts demonstrate that Vertical Fitness conducts business only in Wisconsin and
8 Minnesota, as its gyms are only located in those two states." (Doc. No. 43 at 18–19.) The
9 Court agrees with that.

10 Van Patten offers five facts to support a finding that Vertical Fitness does business
11 in California: (1) Van Patten lives here, and Vertical Fitness texted him; (2) Vertical Fitness
12 texted others with California phone numbers; (3) Vertical Fitness offers online and mobile
13 health applications that are available to anyone, anywhere; (4) Advecor is based in
14 San Diego, CA; and (5) Vertical Fitness aims to expand the "Xperience Fitness" brand
15 nationally. (Doc. No. 50 at 21–22.) The Court finds these alleged connections to California
16 lacking, individually and collectively. The fact is that Vertical Fitness operates regional gyms
17 in Wisconsin and Minnesota; that's where its business is. The texts were targeted at people
18 in those states, and to the extent some weren't it was simply because, like Van Patten, they
19 moved—most likely without Vertical Fitness knowing. (Barton Dep. at 16:16–19;
20 215:9–216:15; Advecor Dep. at 249:7–251:3.) Many of those with California phone numbers
21 may well be Wisconsin or Minnesota residents, anyway. Its website is accessible anywhere,
22 sure, but if that's no basis for personal jurisdiction, which it isn't, the Court has a very hard
23 time accepting that it's a basis for a § 17538.41 claim. *See Zippo Mfg. Co. v. Zippo Dot*
24 *Com, Inc.*, 952 F.Supp.2d 1194, 1124 (W.D. Pa. 1997). The fact that Advecor is based here
25 is not significant. Notwithstanding the dispute about who's actually responsible for the texts,
26 the commercial relationship that exists in California between Advecor and Vertical Fitness
27 still only serves a business interest in Wisconsin and Minnesota. The fact that Advecor is
28 based here is no more significant than if the supplier of Vertical Fitness's sanitary products

1 for its gym bathrooms were based here. Finally, a press release that Vertical Fitness issued
2 did say, “Vertical Fitness Group plans to own and operate health clubs on a national basis
3 under the Xperience Fitness brand,” but this is an aspirational footnote in a two-page
4 document that overwhelmingly confirms the regional limits of Vertical Fitness’s business.
5 It is based in Appleton, WI, it operates 11 gyms in Wisconsin and Minnesota, and it is taking
6 over four more gyms in the Milwaukee area. (See Tomasevich Decl., Ex. 11.) The Court
7 finds no basis for the conclusion that Vertical Fitness does business in California, and for this
8 reason finds that Defendants are entitled to summary judgment on Van Patten’s claim under
9 § 17538.41. Their summary judgment motion is **GRANTED**.

10 The last question is whether Van Patten has a § 17200 claim. The statute prohibits
11 “unlawful, unfair, or fraudulent” acts, and each “prong” provides a “separate and distinct
12 theory of liability.” *Rubio v. Capital One Bank*, 613 F.3d 1195, 1203 (9th Cir. 2010).
13 Van Patten’s complaint pursues the first two; he alleges that the texts were unlawful and
14 unfair. (FAC ¶ 49.) Obviously, a claim of unlawful conduct under § 17200 has to fail,
15 considering the Court’s above rulings on Van Patten’s TCPA and § 17538.41 claims. See
16 *Renick v. Dun & Bradstreet Receivable Mgmt. Servs.*, 290 F.3d 1055, 1058 (9th Cir. 2002).
17 That leaves a claim of unfair business practices.

18 As the Court noted when it certified the class in this case, the meaning of “unfair”
19 under § 17200 isn’t exactly settled: “On the one hand, a business practice is unfair if it
20 violates public policy or is immoral, unethical, oppressive, or unscrupulous and causes
21 injuries to customers that outweigh its benefits. On the other, the unfair practice must be
22 tethered to some actual or threatened impact on competition.” (Doc. No. 54 at 4.) “The
23 ‘proper definition of ‘unfair’ conduct against consumers is ‘currently in flux’ among California
24 courts,’ and some appellate opinions have applied a more stringent test, particularly for
25 conduct that threatens an incipient violation of antitrust law.” *Plumlee v. Pfizer, Inc.*, 2014
26 WL 695024 at *6 n.3 (N.D. Cal. Feb. 21, 2014) (quoting *Davis v. HSBC Bank Nevada, N.A.*,
27 691 F.3d 1152, 1169 (9th Cir. 2012)). Van Patten concedes that the meaning of “unfair” isn’t

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1 settled in the caselaw, and he proceeds to cite three cases that attempt to define it and then
2 fit Vertical Fitness's texts to those definitions. (Doc. No. 50 at 22–24.)

3 Assuming that the “unfair” practices claim doesn’t fail for the same reason that the
4 “unlawful” practices claim does—*Dun & Bradstreet* suggests that where a 17200 claim
5 hinges on a rejected federal claim the § 17200 claim fails on *all prongs*—Vertical Fitness
6 argues that Van Patten can’t allege an injury, anyway, because he wasn’t charged
7 individually for the texts at issue under his unlimited texting plan. (Van Patten Dep. at
8 70:4–25.) Standing to bring a claim under § 17200, for the purposes of this case, is limited
9 to a person “who has suffered injury in fact and has lost money or property as a result of the
10 unfair competition.” Cal. Bus. & Prof. Code. § 17204. The California Supreme Court has
11 recognized that these two prongs—“injury in fact” and “lost property or money”—will often
12 overlap, as they seem to in this case. *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 323
13 (Cal. 2011) Van Patten admitted in his deposition that the texts caused him no emotional
14 distress, and to the extent they made him angry it was only because he sensed they were
15 a violation of the law, not, for example, because they violated his own sense of privacy
16 norms. (Van Patten Dep. at 60:15–61:1.) His own brief even concedes that he believes his
17 injury is at core an economic one. (Doc. No. 50 at 24–25.) When this overlap is
18 present—when the injury in fact *is* the loss of money—a plaintiff must “demonstrate some
19 form of economic injury,” which is “substantially narrower than federal standing under Article
20 III.” *Kwikset*, 51 Cal.4th at 323–24. Moreover, the economic injury must be “nontrivial”: “If
21 a party has alleged or proven a personal, individualized loss of money or property in any
22 nontrivial amount, he or she has also alleged or proven injury in fact.” *Id.* at 325.

23 Against this background, the Court finds no injury here that is cognizable under
24 § 17200. The fact is that Van Patten wasn’t charged for the texts except in the formal sense
25 that he pays for unlimited texting, and the Court can’t reconcile liability for that nominal
26 amount with the holding of *Kwikset*. This shouldn’t come as a surprise to Van Patten. To
27 support the argument that “by paying for an unlimited texting service [he] still suffers an
28 economic injury as a result of Defendants’ conduct,” Van Patten cites three TCPA cases, two

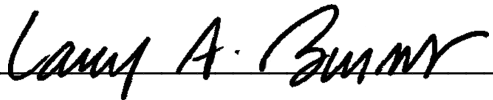
1 of which deal with the injury-in-fact requirement for Article III standing. Those cases are no
2 help at all to his assertion that he has suffered a cognizable injury under California's Unfair
3 Competition Law. Defendants' summary motion as to Van Patten's § 17200 claim is
4 therefore **GRANTED**.

5 **V. Conclusion**

6 To summarize, the Court finds, first, that because Van Patten willingly gave his phone
7 number to Gold's Gym when he became a member he consented to being texted by a
8 re-branded gym about a membership offer. The binding FTC interpretations of the TCPA,
9 as well as the caselaw, compel this conclusion. Second, the Court finds that Vertical Fitness
10 doesn't conduct business in California in a manner that exposes it to liability under
11 § 17538.41. Vertical Fitness operates several gyms in two states in the Midwest. The Court
12 finds, finally, that Van Patten's § 17200 claim fails, either because his previous two claims
13 fail or because he hasn't suffered an adequate "injury in fact" under § 17204. Van Patten's
14 motion for partial summary judgment is **DENIED**, and the Defendants' motions for summary
15 judgment are **GRANTED**.

16 **IT IS SO ORDERED.**

17 DATED: This 16th day of May, 2014.

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19 **HONORABLE LARRY ALAN BURNS**
20 United States District Judge
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